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PP v. KAMAL HISHAM JA'AFAR

HIGH COURT MALAYA, JOHOR BAHRU

MOHD SOFIAN RAZAK J

[CRIMINAL REVISION NO: 43-14-09-2015]

30 NOVEMBER 2015

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CRIMINAL PROCEDURE: *Bail – Granting of – Invocation of revisionary powers to examine correctness and legality of grant of bail – Whether non-bailable offence – Entitlement of bail as of right – Whether discretion to grant bail exercised judiciously – Whether record of proceedings and exhibits supported revocation of grant of bail – Criminal Procedure Code, ss. 323, 325*

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CRIMINAL PROCEDURE: *Revision – Revisionary powers of High Court Judge – Invocation of revisionary powers to examine correctness and legality of grant of bail – Whether powers of High Court in revision wider than powers on appeal – Whether ought to be exercised to correct miscarriage of justice – Whether non-bailable offence – Whether record of proceedings and exhibits supported revocation of grant of bail – Criminal Procedure Code, ss. 323, 325*

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The respondent, who was faced with charges under the Penal Code and the Companies Act 1965, was released on bail pursuant to two orders made by two Sessions Court Judges ('SCJ'). The learned High Court judge in the instant case invoked revisionary power on his own motion pursuant to ss. 323 and 325 of the Criminal Procedure Code ('CPC') to call for and examine the record of the proceedings before the Sessions Court for the purpose of satisfying as to the correctness, legality or propriety of any finding, sentence, order recorded or passed and as to the regularity of any proceedings before the Sessions Court. It was the contention of the respondent, *inter alia*, that (i) both the SCJ were correct and right in granting him bail based on the terms and conditions set therein; (ii) the fear that he might abscond and leave the jurisdiction of the court was without legal basis and unfounded; (iii) the police reports against him for leaving Malaysia were made after he had left the country; (iv) he should not be remanded due to his health problems; and (iv) his father was seriously ill and he needed to be at his bedside.

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Held (revoking bail and ordering remand of respondent in prison):

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(1) The powers of the High Court in acting in revision are wider in scope than its powers on appeal. This court had acted on its own motion to call and examine the record of proceedings of the Sessions Court in granting bail to the respondent. Both parties in the proceedings were unison that the powers of the High Court in revision are exercisable at the discretion of the court and that discretion is untrammelled and free so as to be fairly exercised according to the exigencies of each case.

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- Being discretionary in nature, it must be exercised judicially and within the limits and in the spirit of the legislation and it should be exercised for the purposes of correcting a miscarriage of justice. (para 21) A
- (2) The charges against the respondent herein were non-bailable offences which are governed by s. 388 of the CPC where the granting of bail is at the discretion of the court. Hence, any person charged with committing a non-bailable offence was not entitled to bail as of right. The discretion to grant bail must be exercised judiciously depending on the gravity of the offence. (paras 22 & 23) B
- (3) The police, as early as May 2011, were trying to get in touch with the respondent by resorting to the press to publish as news item that they were looking for the respondent, *ie*, even before the respondent had left Malaysia for Dubai. Further, the endorsement on the respondent's passport showed that the respondent's averment that he was not trying to evade and abscond from the jurisdiction was without basis. It militates against his own argument. (paras 25 & 26) C D
- (4) Bail should not be granted by the court on medical grounds unless it is satisfied that the illness would not be properly treated while the respondent is under detention. The illness suffered by the respondent could be medically treated by the doctors called by the prison authority should there be a request made. The fact that the respondent had fainted outside the courtroom and was rushed to the hospital by the prison authority showed that the respondent was given due medical treatment. Further, the issue of his ailing father and the need for him to be at his bedside was not a compelling factor to be taken into account when considering whether he should be granted bail. The court, however, would allow the respondent reasonable access to visit his ailing father with police escort. (paras 27 & 28) E F
- (5) The relevant factors especially the likelihood of the respondent absconding or leaving the jurisdiction to United Arab Emirates could not be ruled out in light of the fact that the respondent was a permanent resident there and that there was no extradition treaty between Malaysia and United Arab Emirates. The record of proceedings and the exhibits tendered supported the decision that the bail granted to the respondent be revoked. (paras 26 & 29) G

Case(s) referred to:

- Ang Poh Chuan v. PP* [1996] 1 SLR 326 (*refd*) H
- Liaw Kwai Wah & Anor v. PP* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 SC (*refd*)
- Lim Kiap Khee v. PP* [1987] 2 CLJ 442; [1987] CLJ (Rep) 717 HC (*refd*)
- Phang Yong Fook v. PP* [1987] 2 CLJ 448; [1987] CLJ (Rep) 826 HC (*refd*)
- PP v. Bird Dominic Jude* [2013] 8 CLJ 471 CA (*refd*) I
- PP v. Dato' Mat Safuan* [1991] 2 CLJ 1112; [1991] 1 CLJ (Rep) 385 SC (*refd*)
- PP v. Seri Anwar Ibrahim* [1998] 4 CLJ 387 HC (*foll*)
- PP v. Wee Swee Siang* [1948] 1 LNS 49 HC (*foll*)

- A *Re Soo Leot* [1955] 1 LNS 127 HC (*refd*)
Sangappa v. State of Karnataka 1978 Cr LJ 1367 (*refd*)
Zulkifflee Hj Hassan v. PP [1987] 1 LNS 31 HC (*refd*)
- Legislation referred to:**
 Companies Act 1965, ss. 131, 132
- B Courts of Judicature Act 1964, s. 35
 Criminal Procedure Code, ss. 2, 51(1), 111, 311, 315, 316, 317(2), 323, 325, 387, 388(1), 389
 Dangerous Drugs Act 1952, s. 39B(1)(a)
 Penal Code, s. 409
- C *For the applicant - Saiful Edris Zainuddin (Hayati Haron with him); DPPs*
For the respondent - Hanif Hassan (Azmi Ahmad Bakri with him); M/s Hanif Hassan & Co
Asram Zakaria (Vikneswaran with him); M/s Kamal Hisham & Assocs
S Prakash; M/s Gobind Singh Deo & Co
Hazza Khalid; M/s Hazza Khalid Suraya & Partners
Watching brief for Southern Ads Sdn Bhd - Abd Shukor Ahmad (Baljit Singh with him);
M/s Shukor Baljit & Partners
- D *Reported by S Barathi*

JUDGMENT

E **Mohd Sofian Razak J:**

Prelude

- [1] Serene as it was, on the morning of 15 September 2015 while browsing the morning papers and sipping coffee in my chambers and before getting down to the business of the day, my attention was drawn to two news items
- F which appeared in two newspapers respectively namely, 'The Star' and 'Utusan Malaysia' with the caption '**Lawyer now slapped with 10 CBT charges**' and '**Kamal Hisham hadapi dua lagi tuduhan pecah amanah**' (Kamal Hisham to face two more CBT charges' (emphasis added). I carefully read the two news items and found, *inter alia*, that learned Deputy
- G Public Prosecutor in opposing an application for bail by learned counsel for the respondent before the learned Sessions Court Judge (hereinafter called 'the learned SCJ') had stated that the respondent 'had gone missing for three years prior to his capture'. I immediately summoned the Deputy Registrar in charge of criminal matters and intimated that I would invoke my
- H revisionary power on my own motion pursuant to ss. 323 and 325 respectively of the Criminal Procedure Code (hereinafter called 'the CPC') to call for and examine the record of the proceedings before the Sessions Court for the purpose of satisfying as to the correctness, legality or propriety of any finding, sentence, order recorded or passed and as to the regularity of any proceedings of the Sessions Court.
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[2] I am also mindful of the provision of s. 325 of the CPC of the powers of a judge on revision that 'A judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by ss. 311, 315, 316 and 317 of this Code'. In this respect the court would examine the record of proceedings whether the learned SCJ had exercised their discretion in granting bail to the respondent having regard to the extenuating circumstances which justified the refusal or granting of bail to the respondent. The learned Deputy Registrar, as instructed, issued a letter to the Sessions Court informing of the court's decision to review its decision in granting bail to the respondent and asked for the record of proceedings to be transmitted to the court. Simultaneously, the relevant parties namely the Deputy Public Prosecutor (hereinafter called 'the learned deputy') and counsel representing the respondent were notified that the court would fix the hearing for revision on 17 September 2015 at 9am and also directed parties to put in their respective affidavits to facilitate the proceedings.

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The Proceedings

[3] The learned deputy gave a brief background of the case in that the respondent was released on bail pursuant to two orders made by the learned SCJ on 3 September 2015 in a Case No: 62K-6 and 7-09/2015 on a charge under s. 409 of the Penal Code (hereinafter called 'the PC'); on 8 September 2015 for six charges under the Companies Act in a Case No: 62-52-09 (15) and on 14 September 2015 on two charges under s. 409 of the PC in a case No: 62K-08-09/2015. The bail applications were heard before two SCJs namely before Tuan Mohamad Haldar bin Abdul Aziz in respect of Case No: 62K-8-09/2015 and Puan Azura binti Alwi in respect of Case No: 62-52-09/2015 respectively.

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[4] On 17 September 2015 the hearing was adjourned by the court to 21 September 2015 at the request of the respondent to enable them to file a reply to the affidavit filed by the applicant. Be that as it may, learned counsel also submitted that in any hearing for revision, the filing of affidavits was not required because the court need only examine the records of proceedings of the inferior court. The court was of the view that s. 325 should be read together with s. 317(2) of the CPC which stipulates that it may order further evidence. In this respect the court held the view that the taking of further evidence in the context of a revisionary hearing can be in the form of affidavits. The affidavits will be deposed to by the respondent himself or the applicant and annexing the relevant exhibits thereto which have been referred to at the hearing before the learned SCJ. The court granted the respondent's counsel's request for time to file a reply to the applicant's affidavit. The court also made a consequential interim order that the order granting bail to the respondent be revoked and the respondent be remanded until the disposal of the hearing for revision by the court. The court also allowed the respondent be given access to visit his ailing father under escort at a convenient time.

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A [5] It is perhaps convenient at this juncture to state the terms and conditions of the bail granted by both learned SCJ.

[6] For the two charges under s. 409 of the PC, the learned SCJ allowed bail on the following terms and conditions namely:

- B (a) For the first CBT charge (Case No: 62K-6-09/2015)
- (i) a bail of RM300,000 was to be deposited with two sureties;
 - (ii) that the respondent is to surrender his passport;
 - (iii) that the respondent is to report to the nearest police station every two weeks.
- C (b) For the second CBT charge (Case No: 62K-7-09/2015)
- (i) a bail of RM200,000 was to be deposited with two sureties;
 - (ii) that the respondent to surrender his passport;
 - (iii) that the respondent to report to the nearest police station every week.
- D (c) For the charges under the Companies Act (Case No: 62-52-09/2015)
- (i) a bail of RM200,000 to be deposited with two sureties;
 - (ii) that the respondent to surrender his passport;
 - (iii) that the respondent to report to the nearest police station every week.
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F [7] On 21 September 2015 the court heard arguments from both the learned deputy for the applicant and learned counsel for the respondent comprising of Dato' Haniff Hassan, Vikneswaran and Mohd Asram Zakaria. While Dato' Baljit Singh together with Dato' Abd Shukor appeared as watching brief for SASB. After considering the facts and the record of proceedings of the Sessions Court and the principles of granting or refusal of bail, I found that both the learned SCJ had erred in law and facts in allowing

G the respondent bail based on the terms and conditions imposed therein. The court therefore set aside the order of the learned SCJ in granting bail to the respondent for all the charges as the court found that there was a likelihood that based on the facts and circumstances, the respondent might abscond and be out of jurisdiction of the Sessions Court. The respondent who

H was aggrieved by the said decision has since filed a notice of appeal to the Court of Appeal.

The Factual Background

[8] The applicant was represented by its prosecution unit head, En Saiful Edris who narrated the factual matrix of the case as follows:

- I Following complaints by one Ong Eng Leong a manager of Southern Ads Sdn Bhd (SASB) No: 91, Jalan Damai, Taman Seri Setia, Johor Bahru against the respondent for alleged criminal breach of trust relating to the

receipt of rental money of SASB property of whom the respondent was a director, the police on the basis of an alleged wrongdoing by the respondent wanted to interview the respondent.

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On 2 February 2012 a notification to request relevant documents under s. 51(1) of the CPC was issued to the respondent through one Rozana Shamsuddin, a law partner of the respondent. This notification was provided to both Rozana Shamsuddin and the legal firm of Messrs Jahaberdeen & Co who was acting for the respondent at the material time. Despite of this notification having been served on his legal partner and on his counsel, it was never complied with by the respondent. A police report was lodged by one ASP Azlan bin Ahmad for an attempt to serve a notification under s. 111 of the CPC for the respondent to be interviewed. The respondent had purposely avoided compliance with s. 111 CPC notice.

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On 24 February 2012, another police report was lodged by ASP Azlan bin Ahmad in relation for an attempt to serve a notification under s. 111 of the CPC for the respondent to be interviewed. The respondent had purposely avoided compliance with the s. 111 CPC notice. This was an indication of the respondent's unwillingness to cooperate in the investigations and had purposely stayed outside of the Malaysian jurisdiction.

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On 22 March 2012 a warrant of arrest for the respondent was issued following a report lodged namely Johor Bahru Selatan Report No: 585/2012.

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On 7 August 2012 a warrant of arrest for the respondent was issued following a report lodged namely Johor Bahru Selatan Report No: 586/2012.

The respondent was arrested on 2 September 2015 at about 11.15am at Village Hotel Bugis, Singapore based on a warrant of Arrest No: WT 89-551-3/15 and WA No: WT89-552-3/15 dated 15 March 2015 issued by the Johor Bahru Magistrate's Court and was produced and endorsed before the State Court Singapore Judge, His Honour Terrence Tay at 2.40pm the same day for the purpose of execution out of jurisdiction pursuant to Summonses and Warrants (Special Provisions) Act, 1971 (Act 25). The respondent was extradited to Malaysia on the same day.

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On 3 September 2015 the respondent was charged at the Johor Bahru Sessions Court *vide* Case No: 62K-6 and 7-09/2015 for two charges under s. 409 of PC. For these two charges, the applicant objected to the granting of bail on the ground that both are non-bailable offences. The learned SCJ nevertheless on the terms and conditions, set bail in the sum of RM300,000 with two sureties, and for the respondent to surrender his passport to court and to report to the nearest police station every two weeks.

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On 8 September 2015, four other charges together and two alternative charges were preferred against the respondent before the learned SCJ under ss. 131 and 132 of the Companies Act 1965 *vide* Case No: 62 -52-

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- A 09/2015 and bail was set at RM200,000 with two sureties, the surrender of respondent's passport and to report to the nearest police station every week.

The Rebuttal By The Respondent

- B [9] In rebuttal to the averment made by the applicant, the respondent states as follows:

C That the warrants of arrest were not executed on him except that he was arrested on 2.9.2015. The respondent stated that both learned SCJ were correct and right in granting him bail based on the terms and conditions set therein. That the fear he might abscond and leave the jurisdiction of the court was without legal basis and unfounded. He further stated that the police reports made against him were made after he had left Malaysia and if they were made before he left Malaysia, the Immigration authority would have barred him from leaving the country.

D The respondent denied that he had absconded before his arrest and has an address and resided in Dubai, United Arab Emirate. He also has a legal firm and a registered address at the MATRADE building in Dubai. He also has a legal firm in Johor Bahru and Kuala Lumpur and his legal firm is registered with the Malaysian Bar Council. The allegation that the police was unable to get in touch with him was untrue as the police did not made any attempts to get in touch with his partners or with any of his firm's branches. On 31.1.2012, the respondent firm had called for a press conference in Dubai to explain where he was and rebutted all the allegations made that he was absconding.

E He further stated that he did not return to Malaysia as it has come to his knowledge that if he comes back home his life would be in danger because of his differences with certain quarters. He attempted to make police report at the Malaysian Embassy in Dubai but for no apparent reasons the embassy refused to accept his report. The respondent stated that because of the threat to his life that he could not come back to Malaysia. The police was fully aware where he was and at the material time his legal partner, Rozana Shamsuddin was in close contact and assisting in the police investigation.

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G The respondent further stated that he was not served with any notice requiring him to be present at any courts in Malaysia and that he had not purposely avoided himself from the jurisdiction of the courts in Malaysia. The respondent denied he had said that he did not want to be extradited to Malaysia but stated that he wanted his extradition be postponed in view of his fear that his life might be in jeopardy and to get assurances that his life would not be in danger. He stated that there was no reason for him to abscond and to avoid the charges against him. The allegation that he was absconding out of the jurisdiction was preposterous because he has family members in Johor Bahru. Furthermore his father was seriously ill and he needed to be at his bedside.

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He further stated that in March, 2015, he was in Singapore visiting his ailing father receiving treatment at a Singapore hospital brought in by his family members. In July 2015 again he was in Singapore to celebrate Hari Raya Aidil Fitri with his family members and during the interim period he was not served with any warrant of arrest. He had also surfed the online website of the Immigration Department and Interpol and found no restriction on his travel were posted. The respondent stated he did not enter Malaysia although he was in Singapore because he still fears for his life. The travel itinerary by the respondent prior to his arrest were all due to business commitments and to see his family members and not in any way an attempt to abscond or to avoid coming into the jurisdiction of Malaysia.

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The respondent said he should not be remanded because he has health problems of high blood pressure, diabetes and hyper-tension which requires special treatment and medical prescriptions. On 17.9.2015 the respondent said he fainted due to high blood pressure and had a nose bleed and was rushed to the Sultanah Aminah Hospital Johor Bahru for treatment. The doctor advised him to get sufficient rest and the tendency to get stroke if he was in the same situation. The respondent undertook to produce a medical report prepared by the doctor if the Court direct it be produced.

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Submission By The Applicant (Prosecution)

[10] The learned deputy submitted that the court was right in asking the parties to put in additional evidence in the form of affidavits in exercise of its revisionary powers to invoke the appellate powers of the High Court under ss. 311, 315, 316 and 317 of CPC. Under s. 317 CPC the court is allowed to direct that additional evidence be adduced at the original trial court or the High Court itself.

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[11] The learned deputy submitted that the respondent was arrested for offences committed which are non-bailable and the statutory definition for non-bailable offence is as provided in s. 2 of the CPC which, *inter alia*, states as follows:

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2. (1) In this Code:- 'bailable offence' means an offence shown in the First Schedule or which is made bailable by any other law for the time being in force and 'non-bailable offence' means any other offence.

[12] The learned deputy also cited s. 388(1) of CPC on the statutory provision relating to non-bailable offence and when person accused of non-bailable offence may be released on bail. In this respect the learned deputy submitted that in non-bailable offence cases, the onus and burden of proof to show that the accused has special circumstance to be granted bail especially on the factor of non-absconding, lies totally on the accused. If the accused cannot prove this on a balance of probabilities the court must not grant him bail. This is to be distinguished from bailable cases where the

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A accused has *prima facie* rights to be bailed, unless the prosecution is able to show that he is a flight risk. In the event of the latter being shown by the prosecution, the accused in spite of it being a bailable offence, will be deprived of bail.

B [13] From the notes of proceedings before both the learned SCJ, the learned deputy had mounted a common front in that the respondent has been avoiding the jurisdiction of Malaysia by refusing to come forward and giving all the assistance required in respect of the complaints made to the police on the offences relating to the charges preferred against him. The respondent was a permanent resident in Dubai and the likelihood that he might be out of the jurisdiction of Malaysia should not be discounted. There is no extradition treaty between Malaysia and United Arab Emirates to enable the respondent to be extradited from United Arab Emirates to Malaysia to face criminal charges here. The learned deputy has also impressed upon the courts that the respondent has for most of the time been out of the jurisdiction and admittedly the respondent had visited his ailing father who had received treatment at a hospital in Singapore in March 2015 and spending Hari Raya with his family members in July 2015 in Singapore but made no attempts to enter Malaysia. The learned deputy dismissed the unfounded fear that his life was in danger being the reason why he did not want to come back to Malaysia unless he received assurances that his life was not in danger. The learned deputy said his alternative submission that if the court was minded to grant bail to the respondent he urged the court to set terms and conditions and the minimum amount of bail be set at RM200,000 was made out of fear that if the court without hearing the views from the applicant might grant bail with lenient terms and conditions. The learned deputy was of the view that his acquiescence to suggest the terms and conditions should the court agrees to grant bail should not be construed as relenting in his objection to granting bail to the respondent. It is quite common for an alternative submission couched in that manner be made and not to be interpreted as if the prosecution has agreed to the court granting bail to the respondent. Quite understandably it drew a swift response from the respondent's counsel that the applicant cannot 'blow hot and cold' about it. Either agreed or disagreed and no two ways about it. Before this court the learned deputy urged that the order made by both the learned SCJ granting bail be revoked and that the respondent be committed to prison to be remanded until the disposal of the trial all the charges against him based on the extenuating circumstances that bail should not have been granted.

The Submission Of The Respondent

I [14] Counsel for the respondent in his submission argued that if the court were to examine and peruse the record of proceedings at the Sessions Court it will show that the learned SCJ had directed his mind to the arguments and evidence adduced before the court and came to a correct decision that the

court was inclined to release the respondent on bail with stringent terms and conditions which included setting high bail amount, the surrender of his international passport and to report to the nearest police station every one or two weeks pending the trial and disposal of the cases. Learned counsel cited the case of *Ang Poh Chuan v. PP* (1996) 1 SLR 326 where it states that the revisionary jurisdiction of the High Court should be invoked only if the court is satisfied that some serious injustice has caused which warrants the exercise of its powers of revision.

[15] The respondent further argued that at the lower court the only issue raised by the applicant was the fact there was a likelihood that the respondent would abscond and evade the jurisdiction of the court. However learned counsel submitted that notwithstanding that the applicant said there were warrants of arrest issued against the respondent but the warrants of arrest were issued after the respondent had left the country. This argument was labelled as an afterthought as the respondent had left the country in the year 2011 and no warrants of arrest were served on him personally. It was further submitted that the police did not make any attempts to locate or to trace the respondent. The respondent has furnished his contact details to the police of which he was ready to assist the police in relation to the instant case. The respondent also stated that if he was on the 'wanted list' by the police, how could the Malaysia Trade Centre agreed to rent out its office unit in Dubai to the respondent's legal firm and that he had also received an award from the Ministry of International Trade and Industry (MITI). That being the case, the respondent has never evaded the police investigation.

[16] On the issue of non-bailable offence, learned counsel conceded that the charges against the respondent are non-bailable offences. Learned counsel submitted that under s. 388 of CPC it is well settled that in non-bailable offence cases, bail is at the discretion of the court and its discretion it must be exercised judiciously. In the light of the above facts before the lower courts, the decision to grant bail with terms and conditions attached was clearly in accordance with the case of *PP v. Wee Swee Siang* [1948] 1 LNS 49; [1948] 1 MLJ 114. The purpose of granting bail is solely to secure the attendance of an accused and that he is innocent until proven guilty. It was further submitted that there were no reasonable ground for believing that the respondent was guilty of all the offences as adduced by the applicant in court. Any benefit of the doubt should be in favour of the applicant. Learned counsel went on to cite two other cases namely *Zulkifflee bin Hj Hassan v. PP* [1987] 1 LNS 31; [1987] 2 MLJ 527 where bail is granted for an offence under s. 409 PC. In *Phang Yong Fook v. PP* [1987] 2 CLJ 448; [1987] CLJ (Rep) 826; [1988] 1 MLJ 267 the court held that 'Although the Indian decisions cited above are not consistent, one thing is clear, all cases agree that the bail of an accused person cannot be cancelled unless there is some form

A of evidence in support of the application. The Indian Court has decided that mere vague allegations would not be sufficient for the purpose of cancelling a bail'.

[17] Before concluding, learned counsel made reference to *PP v. Bird Dominic Jude* [2013] 8 CLJ 471 (W-05-216-09/2012) where the Court of
B Appeal granted bail of RM50,000 with two local sureties to the respondent a foreigner who has been acquitted of a drug charge under s. 39B(1)(a) Dangerous Drugs Act 1952 until the disposal of the appeal by the applicant against the decision of the High Court.

C [18] Learned counsel prayed that the order by both the learned SCJ be affirmed.

Observation And Finding Of The Court

[19] The great author of '*Mallal's Criminal Procedure*' the late Mr Bashir
D Mallal had described the object of the revisional legislation found in Chapter XXXI of the Criminal Procedure Code is 'to confer upon the High Court a kind of paternal or supervisory jurisdiction in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent hardship of treatment, which has resulted on the one hand in some injury to the due maintenance of law and
E order or on the other hand undeserved hardship to individuals'.

[20] The general supervisory and revisionary jurisdiction of the High Court is further encapsulated in s. 35 of the Courts of Judicature Act 1964 which states as follows:

F 35.(1) In addition to the powers conferred on the High Court by this or any other written law, the High Court shall have the general supervisory and revisionary jurisdiction over all subordinate courts, and may in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or persons interested, at any stage
G in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof, and may remove the same into the High Court or may give to the subordinate court such directions as to the further conduct of the same as justice may require.

[21] It could be observed that the power of the High Court in acting in
H revision are wider in scope than its powers on appeal. The court in the instant case has acted on its own motion to call and examine the record of proceedings of the Sessions Court in granting bail to the respondent. Both parties in the proceedings are in unison that the powers of the High Court in revision are exercisable at the discretion of the court and that discretion is untrammelled and free so as to be fairly exercised according to the
I exigencies of each case. (see *Re Soo Leot* [1955] 1 LNS 127; [1956] MLJ 54). Being discretionary in nature, it must be exercised judicially and within the

limits and in the spirit of the legislation and it should be exercised for the purposes of correcting a miscarriage of justice. (see *Liaw Kwai Wah & Anor v. PP* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163; [1987] 2 MLJ 69 SC). In an application for revision the main question which the High Court has to consider is whether substantial justice has been done and whether it should interfere in the interest of justice whereas in an appeal the appellant would be entitled to demand an adjudication upon all questions of fact and law raised in the appeal.

[22] The uncontroverted facts of the instant case is that all the charges against the respondent are non-bailable offences. Before embarking on the merits of the case it is perhaps convenient to advert to the law relating to bail. This area of the law is governed by ss. 387, 388 and 389 of the CPC. Section 387 deals with bailable offence. Bailable offence means an offence shown as bailable in the First Schedule to the CPC or which is made bailable by any other law for the time being in force. Column 5 of the First Schedule of the CPC prescribes which Penal Code offences are bailable and which are non-bailable. For offences against laws other than the Penal Code, the First Schedule provides that any such offences punishable with imprisonment for less than three years or with a fine only shall be bailable. Where an accused is charged with a bailable offence he is entitled to be released on bail as a matter of right (see *PP v. Dato' Mat Safuan* [1991] 2 CLJ 1112; [1991] 1 CLJ (Rep) 385; [1991] 2 MLJ 186). There is no provision in the CPC which allows bail to be revoked or cancelled in the case of bailable offence under s. 387 of CPC.

[23] Section 388 of CPC deals with non-bailable offence where in this case the granting of bail is at the discretion of the court. (see *Lim Kiap Khee v. PP* [1987] 2 CLJ 442; [1987] CLJ (Rep) 717; [1988] 1 MLJ 198). Any person charged with committing a non-bailable offence, is not entitled to bail as of right. The exercise of discretion must be judiciously and depends on the gravity of the offence. Column 5 of the First Schedule of the CPC stipulates that non-bailable offence is where the punishment is death or imprisonment for seven years or more or for three years or more but less than seven years.

[24] Both parties in their submissions referred to the case of *PP v. Wee Swee Siang* [1948] 1 LNS 49; [1948] 1 MLJ 114 where Callow J in refusing the accused's application for bail cited with approval nine of the 12 factors His Lordship had considered. These factors are not exhaustive and factors such as age, sex and state of health of the accused are relevant factors to be considered. The 12 factors His Lordship had considered when refusing the application for bail were as follows:

- (i) the nature and the gravity of the offence charged;
- (ii) the nature of the evidence in support of the charge;

- A (iii) whether there was or was not reasonable ground for believing the accused guilty of the offence;
- (iv) the severity and degree of punishment which conviction might entail;
- (v) the guarantee that the accused, if released on bail, will not either abscond or obstruct the prosecution in any way;
- B (vi) the danger of the offence being committed or repeated;
- (vii) the danger of the witnesses being tampered with;
- (viii) whether the accused, if released on bail, is likely to tamper with the prosecution evidence;
- C (ix) whether the accused is likely to get up false evidence in support of the defence;
- (x) the opportunity of the accused to prepare the defence;
- D (xi) the character, means and standing of the accused; and
- (xii) the long period of detention of the accused and probability of further period of delay.
- [25] Before this court it was submitted vehemently by the learned deputy on the 12 reasons as stipulated in *PP v. Wee Swee Siang* (*supra*) and the central plank of his submission rested on the likelihood that if the respondent was granted bail he would abscond and leave the jurisdiction. The learned deputy had mentioned this fact in relation to the efforts made by the police to get in touch with the respondent at the hearing before the learned SCJ. The court has seen the exhibits tendered by the applicant to show that as early as May 2011 the police were trying to get in touch with the respondent by resorting to the press to publish as news item that the police were looking for the respondent. These newspaper cuttings could be seen in the affidavit affirmed by Supt. Siva Pergahsum Shanmugam on 17 September 2015 as exh. SP14. This was before the respondent had left Malaysia for Dubai. If that had been the case, there was no basis for the respondent to say that all the notices or warrants of arrest were issued against him after he had departed for Dubai. The court was also appraised of the fact that the endorsement in the respondent's passport showed that the respondent had travelled to the following destinations:
- H (i) Thailand - 2 March 2013
- (ii) Heathrow - 19 March 2012
- (iii) Heathrow - 10 April 2012
- I (iv) Heathrow - 29 June 2012
- (v) Tanzania - 11 October 2013

- (vi) Heathrow - 5 September 2013 A
- (vii) Heathrow - 7 December 2013
- (viii) Sri Lanka - 29 September 2014
- (ix) Gatwick - 24 February 2014
- (x) Heathrow - 29 March 2015 B
- (xi) Singapore - 14 July 2015
- (xii) Singapore - 1 September 2015
- [26]** The above endorsement on his passport showed something contrary to his averment that he was not trying to evade and abscond from the jurisdiction. It militates against his own argument. The court found that the respondent's allegation that if he had come back to Malaysia and in particular to Johor Bahru his life would be in danger was without any basis and dismissed it as an unfounded fear. The court is also appraised of the fact that there is no extradition treaty between Malaysia and United Arab Emirates if respondent is found to be residing there, he being a permanent resident thereat. C D
- [27]** On the submission by learned counsel that the respondent has health problems, the court was of the view that bail on medical ground should not be granted by the court unless it is satisfied that the illness is such as could not be properly treated while the respondent was under detention. The court was of the view that the illness suffered by the respondent in the instant case could be medically treated by the doctors called by the prison authority should there be a request made. It was held in *Sangappa v. State of Karnataka* (1978) Cr LJ 1367 that where proper treatment is available in the place of detention, bail cannot be granted in respect of the illness. This issue about health condition of the accused was discussed in *PP v. Dato' Seri Anwar bin Ibrahim* [1998] 4 CLJ 387; [1998] 4 AMR 3878 where it was not shown by any material on record to the court that the accused was not receiving any medical treatment while in detention and neither did counsel said that the accused was not receiving the required treatment. Likewise in the instant case the court was of the view that the fact that the respondent had fainted outside the courtroom and was rushed to the hospital by the prison authority showed that the respondent was given due medical treatment and had received medical treatment from the hospital. E F G H
- [28]** There was also the peripheral issue of his ailing father and the need for him to be at his bedside. In the opinion of the court that not a compelling factor to be taken into account when considering whether he should be granted bail. This certainly is not one of the 12 factors mentioned in *PP v. Wee Swee Siang* (*supra*) although it was said that the factors to consider are I

A not exhaustive. The court would, however, in the circumstances 'temper justice with mercy' and allowed the respondent reasonable access to visit his ailing father with security escort.

B [29] The court has examined the records of the proceedings of the Sessions Courts and found that both the learned SCJ had not alluded their mind to the relevant factors especially the likelihood of the respondent absconding or leaving the jurisdiction to United Arab Emirates which cannot be ruled out. The record of proceedings and the exhibits tendered in this proceeding supports the decision that the bail granted by the learned SCJ be revoked.

C **In Conclusion**

D [30] For the reasons as adumbrated above and in all the circumstances, the court hereby exercised its discretionary power and revoked the bail granted to the respondent by both the learned SCJ on 3 September 2015, 10 September 2015 and 14 September 2015 respectively and ordered that the respondent be remanded at the Ayer Molek Prison. It is further ordered that the respondent be allowed to visit his ailing father when necessary at a reasonable convenient time with police escort.

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